National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

DATE: October 16, 1996

TO: James J. McDermott, Regional Director, Region 31

FROM: Barry J. Kearney, Associate General Counsel, Division of Advice

SUBJECT: Metro Building Maintenance Case 31-CA-21719; Metro Building Maintenance Co., Case 31-CA-21719

530-4080-5036, 530-4090-6700, 530-8034

This case was submitted for advice as to whether the Employer violated Section 8(a)(1) and (5) by refusing to recognize and bargain with the Union concerning employees who perform work at facilities which were covered by a contract between the Union and the previous contractor.

FACTS

. The employees who performed the work were part of a bargaining unit of approximately 8,000 employees, of whom approximately 2,000 were employees of ABM. The bargaining unit employees worked at numerous jobsites; 16 separate geographical appendices set out the differing terms and conditions applicable in various areas. For example, employees who worked in downtown Los Angeles received higher wages than employees who worked in various areas outside Los Angeles. The jobsite at issue in this case falls within Geographical Appendix 12 (Woodland Hills/West Valley). Appendix 12 stated that employees who worked within the specified area were to receive one to three weeks of vacation, depending upon seniority, and be subject to union-security. Pursuant to a Memorandum of Understanding entered into on March 25, 1991, the collective-bargaining agreement was extended for three more years, through March 31, 1995. However, employees covered by Appendix 12 were exempted from the provisions described above and were deemed covered only by contract provisions addressing nondiscrimination, recognition of the union, job bidding procedures, and assignments.

On April 1, 1995,[(1)] ABM and the Union reached agreement on a new contract, to be effective from April 1, 1995 through March 31, 2000. Union membership ratified this agreement on April 8, 1995. This new agreement places the Los Angeles Times jobsite within Geographical Area 4 and does not exempt employees working on this location from any contractual provisions.[(2)] Thus, these employees were covered by the entire contract including provisions requiring paid vacation, union security, and the appointment of a Union steward for each location with five or more employees.[(3)] Also, this new agreement in Appendix D specifies minimum starting wages and minimum wage increases for Area 4.

On June 5, ABM notified the Union that its contract covering the Los Angeles Times jobsite would end on June 30 because the Times had signed a new maintenance contract with a non-union company, Metro Building Maintenance Co. (the Employer). At some time late in June, Metro officials came to the jobsite and said that the Employer would hire the eight unit employees who had previously been employed by ABM and a former ABM supervisor. Metro also hired one new employee. Unit employees assert that they perform the same type of work they had previously performed, with some additional, but similar responsibilities, and that they are receiving 50 cents an hour more than they had been paid by ABM.

On June 29, a Union organizer visited the jobsite and tried unsuccessfully to convince four unit employees to sign a petition asking the Los Angeles Times to retain ABM as the janitorial contractor at the site.

Union organizers again visited the jobsite on July 3 and 5. On July 6, the Union sent the Employer a letter requesting recognition and the scheduling of bargaining dates "to achieve a collective bargaining agreement." The letter also requested information about the unit and stated that the Union would seek a remedy from the Board if the Employer did not agree "in writing to the above points" by July 14. The Employer has not responded to that letter.

One Union witness,[4] who has worked at the Chatsworth location since approximately 1992 or 1993, asserted that he never received any benefits (specifically health, vacation, health and welfare, or pension benefits, etc.) and never saw a Union representative at the jobsite.[5] As far as he knew, no union ever represented the employees at the jobsite. Moreover, the union-security clause has not been enforced, and the Union has not filed any grievances on behalf of any employees.

The Union asserts that the employees in question received the contractual benefits provided by the most recent collective-bargaining agreement. However, the Union has not provided any evidence in response to the Region's request for evidence to support the Union's assertion. The Union also asserts that it had agreed, in the Memorandum of Understanding, that the employees located in the relevant geographical area would not receive most of the contractual benefits received by employees in other locations because the Union's negotiating strength was weaker in this geographical area than in other areas. The Union has not otherwise explained why it agreed to a contract that was generally not applicable to the employees involved in this case.

ACTION

We conclude that the charge should be dismissed, absent withdrawal, because the Union has not enforced the applicable contract on behalf of the employees working at the Chatsworth location and has not otherwise acted as the representative of these employees.

The Union claims that the Employer, as a Burns[6]

successor, must bargain with it because the Employer's employees were covered by the current and previous collective-bargaining agreements when they worked for the predecessor employer. In evaluating claims of representative status at specific locations based on multi-site contracts, the Board has rejected such claims where there was evidence that the contract had not been enforced at the location in question.

Thus, in United Artists Communications,[7] the union and the employer had been parties to a collective-bargaining agreement covering employees at a number of movie theaters operated by the employer. The contract generally had not been enforced at one specific theater;[8] indeed, employees were unaware of their purported representation by the union. In response to an organizing campaign conducted by another union, a majority of the employees signed authorization cards on behalf of the other union. The Board found that the employer's response to this organizing campaign violated Section 8(a)(1), (2) and (3). The Board also found that the employer violated Section 8(a)(5) by refusing to recognize and bargain with the second union. In reaching this conclusion, the Board affirmed the conclusion of the ALJ, at 1063-64, that the employees had been unrepresented at the time of the organizing campaign by the second union. The ALJ noted that the employees had not known that they were purportedly covered by a collective-bargaining agreement and that the first union had not offered an explanation for its failure to enforce the agreement at this theater even though it knew that the contract was not being enforced. The ALJ also rejected the argument that substantial enforcement of the contract at other theaters operated by the employer gave the union representative status and created a contract bar at the theater involved in this case. Finding specifically that the failure to enforce the collective-bargaining agreement on behalf of the employees invalidated the employer's claim that it was obligated to recognize and bargain with the first union, the ALJ held, at 1064, "It would be patently unfair to allow the Respondent, who deliberately withheld the benefits of the contract from these employees, to now rely on this contract to prevent these employees from being properly represented."

Based on similar facts, a similar result was reached in Promenade Garage Corp.,[9]

where the ALJ, who was affirmed by the Board, relied on United Artists to find that a union did not represent employees at one location where the employees had never been aware of their purported representation and the multi-location agreement had never been applied at the location in question

In Silver Lake Nursing Home,[10] a multi-employer association and a union were parties to a collective-bargaining agreement covering a multi-employer unit of licensed practical nurses employed at nursing homes. When the employer opened a new nursing home, it entered into an agreement with the union whereby it agreed to be bound by the multi-employer contract.

However, the union waived immediate application of that contract's union-security provisions and the provision requiring employer contributions to the pension fund. The union also apparently waived immediate compliance with other provisions of the multi-employer agreement. Shortly thereafter, the employer became a member of the multi-employer association and designated the association as its collective-bargaining representative.

Confronted by an election petition filed by a second union, the Board rejected the first union's claim that it represented the unit employees. The Board found that, consistent with the original agreement between the employer and the union, a number of the contractual terms covering the licensed practical nurses were not enforced either before or after the employer joined the multi-employer association. The Board specifically noted that the employees were paid more than specified in the contract, in part because of direct negotiations between the employer and the union after the employer had become a member of the association. The Board also noted that there had been "significant departures"[(11)] from the overtime and holiday provisions of the contract, that the employer had not made contributions to the union's pension and welfare funds, that no stewards had been elected or appointed, and that no grievances had been filed. The Board found that the only evidence of the union's "direct representation" of the employees was the wage increase that the union had directly negotiated with the employer. The Board specifically rejected the union's claim that it was "customary not to enforce some of its contract provisions against a new nursing home...while such a home is getting on its feet."[(12)]

As to the union's claim that other contractual benefits were provided to the employees, the Board credited the employer's assertion that he had not seen the multi-employer agreement and merely provided the standard industry-wide benefits to the nurses.

A similar conclusion -- that the Union lacks representative status as to the employees working at the Chatsworth location -- is warranted in this case. Here, the collective-bargaining agreement effective April 1, 1995, was completely applicable to the employees working at the Chatsworth location. However, there is no evidence that this contract was applied or enforced as to these employees. The Union's one employee-witness did not receive any contractual benefits, such as paid vacation. Nor was there a Union steward, even though the contract required the appointment of stewards at locations with at least five employees, and there were eight employees working at the Chatsworth location. Nor was the union security provision enforced. Moreover, while the contract provided for minimum starting wage rates and minimum wage increases and the predecessor employer may have been paying at least those minimum rates, there is no evidence that the predecessor employer had been paying this wage rate because of the contract, rather than because of the industry standard.[(13)] Finally, the Union's one employee witness did not previously know that the employees were supposedly represented by the Union.

Also in response to the Region's request for evidence to support the Union's assertion that these contractual terms were applied to, and on behalf of, the employees working at the Chatsworth location, the Union told the Region that it would not supply any further evidence.

Thus, there is now no evidence that the Union treated the current collective-bargaining agreement as applicable to the employees in question or otherwise acted in a representative capacity on behalf of these employees.

We note that in United Artists and Promenade Garage, employers and unions asserted that multi-employer, multi-locations agreements compelled them to recognize and deal with each other despite successful organizing campaigns by outside unions. In Silver Lake, one union argued that a multi-employer agreement barred a petition filed by another union. In this case, the Union is asserting that the multi-employer agreement creates a bargaining obligation by a successor; the Union is not using the agreement as a shield against an organizing campaign by another union. This distinction is irrelevant. The key principle is the same -- a union that has not enforced a contract on behalf of a unit or otherwise acted as the representative of the employees cannot successfully claim to represent the employees and that the employer must recognize and deal with it.

We recognize that the current contract, upon which the Union relies in support of this charge, was applicable to the Chatsworth employees for only three months before the successor employer took over operations. Thus, it could be argued that it is inappropriate to base a conclusion that the Union lacks representative status on the lack of enforcement during such a short period, especially where certain benefits, such as periodic wage increases, might not have been due during this three month period.

However, this argument must fail. First, we note that certain provisions, such as those involving union security and the appointment of a steward, were immediately applicable but were not enforced. Second, this nonenforcement of the applicable contract terms is consistent with, and a continuation of, the Union's previous practice as to these employees. Specifically, during the previous three years, when the Memorandum of Understanding was in effect, and only the provisions addressing nondiscrimination, recognition of the union, job bidding procedures and assignments were applicable to the Chatsworth employees, not even these few provisions were apparently enforced. Moreover, there is no evidence that the Chatsworth employees knew, during this earlier period as well as during the last three months that they worked for the predecessor employer, that they were supposed to be represented by the Union. Thus, the Union cannot rely on the prior Memorandum of Understanding in support of its representational claim. In similar circumstances, in Weber's Bakery,[(14)] a union could not rely on the existence of a prior, expired contract for a presumption of majority status because the union had not policed the contract or serviced the unit employees, who did not know of their alleged union representation.[(15)]

For all of the above reasons, we conclude that the Union has not shown that it was the collective-bargaining representative of the employees working at the Los Angeles Times Chatsworth location.[(16)]

Therefore, although the Employer is arguably a successor to an employer who was party to a multi-employer agreement, [(17)] the Employer is not obligated to recognize and bargain with the Union concerning the employees involved in this case.

Accordingly, the charge should be dismissed, absent withdrawal.

B.J.K.

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[1] All subsequent events occurred in 1995.

[2] Employees working at various other locations, specifically those in Geographical Areas 6 and 7, were not covered by most of the contractual terms.

[3] There were approximately eight unit employees and at least two supervisors at the jobsite.

[4] This is the only employee-witness the Union presented.

[5] As noted above, the Memorandum of Understanding effective from March 25, 1991, through March 31, 1995, did not provide any of these benefits for employees who worked in the Chatsworth location and other areas covered by Appendix 12. However, the contract that became effective on April 1, 1995 provided paid vacation for employees who worked at the Chatsworth location.

[6] NLRB v. Burns International Security Services, 406 U.S. 272 (1972).

[7] 280 NLRB 1056 (1986).

[8] During part of one year, dues had been deducted for three of the 10 employees in the unit and health and welfare contributions had been made for two employees.

[9] 314 NLRB 172, 181-182 (1994).

[10] 178 NLRB 478 (1969).

[11] Id. at 478.

[12] Id. at 479 fn. 6.

[13] We note that the Union's one employee-witness was apparently receiving more than the contractual minimum wage for his job and that the contractual starting wage rates for Area 4 were similar to the statutory minimum wage. Cf. Silver Lake Nursing Home, supra, at 479 fn. 6.

[14] 211 NLRB 1, 10-12 (1974).

[15] Cf. Brower's Moving & Storage, 297 NLRB 207 (1989), where the Board reversed the ALJ, who had relied on this holding of Weber's Bakery to dismiss the complaint. The Board found that the union had intermittently policed the contract and that there was no evidence that the union had ever acquiesced in the repudiation of substantial portions of the contract or that the union and the employer had had "an arrangement or understanding that would negate an intent to enter into a valid collective-bargaining relationship." Id. at 209.

[16] The Union's reliance on Petoskey Geriatric Village, 295 NLRB 800 (1989), for the proposition that a successorship finding does not require the existence of a collective-bargaining agreement is misplaced. In that case, the union had been certified. Here, there is no certification or evidence other than the existence of the multi-employer association-Union collective-bargaining agreement, to indicate that the Union represents or should be presumed to represent the Chatsworth employees.

[17] In light of the above conclusion, it is unnecessary to decide whether there is sufficient continuity between the predecessor and the Employer, see Fall River Dyeing & Finishing v. NLRB, 482 U.S. 27, 43 (1987), to make the Employer a successor to the predecessor. Compare Nova Services Company, 213 NLRB 95 (1974), with Hydrolines, Inc., 305 NLRB 416 (1991).